

The above findings are hereby made the orders, decrees, and rulings of the Court.

The court reporter costs are hereby split between the Self-Insured Conagra Foods and [Ace] American Insurance Company % *[sic]* Gallagher Bassett Services.¹

The Judge did not make any specific findings of fact or conclusions of law. But implicit in his order is that claimant's present right shoulder injury constituted a new accident and new injury rather than a natural consequence of his earlier shoulder injury.

Armour and its insurance carrier argue Judge Howard erred. They argue the surgeon's notes regarding claimant's proposed shoulder surgery and the proposed use of a double row of sutures indicates claimant's first right shoulder surgery failed. Consequently, Armour and its insurance carrier contend claimant's need for a second shoulder surgery is a natural consequence of the injury he sustained while working for ConAgra and, therefore, ConAgra should be responsible for the workers compensation benefits the Judge awarded.

Conversely, ConAgra contends the April 11, 2007, Order should be affirmed. It argues Armour assigned work to claimant that violated his work restrictions, which caused claimant's rotator cuff to tear in a different location from where it was initially torn. ConAgra also argues that Armour has failed to present any evidence to establish (1) claimant's present right shoulder problem is a manifestation of failed sutures or (2) that claimant's present rotator cuff tear would not have occurred but for the earlier surgical repair. Moreover, ConAgra argues claimant's present rotator cuff tear is anterior to the previous tear, which casts doubt on Armour's theory of liability. In addition, ConAgra contends claimant's current rotator cuff tear would not have occurred but for the work he performed for Armour.

The only issue before the Board on this appeal is whether claimant's present right shoulder injury arose out of the work he performed for Armour between October 23, 2006, and December 19, 2006, or whether that injury developed as a natural and probable consequence of the initial right shoulder injury that claimant sustained in March 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds as follows:

Claimant first injured his right shoulder in March 2005, while working for ConAgra. In early September 2006, Dr. John N. Vani performed arthroscopic surgery on claimant's

¹ ALJ Order (Apr. 11, 2007).

right shoulder to repair a tear in the rotator cuff. The doctor kept claimant off work until October 23, 2006, when claimant was released to return to work using his left arm only.

When claimant returned to work in October 2006, Armour had purchased and taken over the former ConAgra meat processing plant. Claimant testified some of the work that Armour assigned required him to violate his work restrictions and use his right arm. As claimant worked for Armour between October 23 and December 19, 2006, his right shoulder symptoms worsened. Consequently, claimant returned to Dr. Vani on December 19, 2006, and was given additional work restrictions. The doctor also sent claimant for an MRI, which indicated another tear in his rotator cuff.

Dr. Vani's January 16, 2007, office notes indicate claimant told the doctor his right shoulder pain and popping worsened when he went back to work and did more than what had been prescribed. At this juncture we do not have Dr. Vani's testimony. But the doctor's office notes were presented at the preliminary hearing and those notes state the doctor is planning an open repair with bone tunnels, perhaps additional suture anchors, and a double row repair. The doctor noted claimant's new tear in the rotator cuff was anterior to his old repair. The doctor also referred to the proposed repair surgery as a revision.

Based upon this limited record, the undersigned Board Member believes the April 11, 2007, Order should be affirmed. Claimant is the best witness to testify about the work he performed for Armour when he returned to work in October 2006. Accordingly, this record establishes that claimant violated his work restrictions against using his right arm at work during the period from October 23, 2006, through December 19, 2006. The undersigned concludes it is more likely that claimant's work activities during that period caused the new tear in his right rotator cuff rather than the tear occurring as a natural and probable consequence of the March 2005 injury. At this juncture, it appears that claimant's work activities from October 23 through December 19, 2006, caused further injury or aggravation to his right shoulder. Although it cannot be said there is no relationship between claimant's initial shoulder injury and his present condition, that is not the test. Liability rests with Armour and its insurance carrier as it was claimant's subsequent work for Armour that has caused the present need for additional medical treatment. Consequently, the April 11, 2007, Order should be affirmed.

By statute, these preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as

² K.S.A. 44-534a.

permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the April 11, 2007, Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Mark E. Kolich, Attorney for ConAgra
D'Ambra M. Howard, Attorney for Armour and its Insurance Carrier
Steven J. Howard, Administrative Law Judge